

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

FRANK HEARRING,

Case No. 3:22-cv-00377-LRH-CSD

Petitioner,

v.

ORDERWILLIAM REUBART, *et al.*,

Respondents.

Petitioner Frank Herring has filed a Petition for Writ of Habeas Corpus (ECF No. 1-1 (“Petition”)) pursuant to 28 U.S.C. § 2254, a motion for appointment of counsel (ECF No. 1-2), and a motion for leave to proceed *in forma pauperis* (ECF No. 4). This habeas matter is before the Court for initial review under the Rules Governing Section 2254 Cases. For the reasons discussed below, the Court grants Herring’s motion for leave to proceed *in forma pauperis*, defers consideration of his motion for the appointment of counsel, and orders him to show cause in writing within thirty days as to why the Petition should not be dismissed for a lack of jurisdiction.

I. BACKGROUND

Herring challenges a 2013 conviction and sentence imposed by the Eighth Judicial District Court for Clark County (“state court”). *State of Nevada v. Frank Herring*, Case No. C-13-291159-1.¹ On December 30, 2013, the state court entered a judgment of conviction, pursuant to a guilty plea, for second-degree murder with the use of a deadly weapon. Herring was sentenced to life with the possibility of parole after 10 years plus a consecutive term of 96 to 240 months for the deadly weapon enhancement. Herring did not file a direct appeal.

On March 30, 2015, Herring filed a state petition for writ of habeas corpus. The state court

¹The Court takes judicial notice of the online docket records of the Eighth Judicial District Court and Nevada appellate courts. The docket records may be accessed by the public online at: <https://www.clarkcountycourts.us/Anonymous/default.aspx> and <http://caseinfo.nvsupremecourt.us/public/caseSearch.do>.

1 denied post-conviction relief on September 14, 2015. Herring filed a post-conviction appeal, and
2 on April 14, 2016, the Nevada Supreme Court affirmed, determining that Herring's state petition
3 was untimely and procedurally barred. Remittitur issued on May 9, 2016.

4 On or about July 11, 2016, Herring initiated a federal habeas corpus proceeding in case
5 number 2:16-cv-01639-GMN-GWF,² challenging the December 30, 2013, judgment of
6 conviction. On January 5, 2017, United States District Court Judge Gloria M. Navarro dismissed
7 Herring's petition because it was untimely and because all grounds were procedurally defaulted.
8 Judgment was entered.

9 On February 25, 2019, Herring filed a second state petition for writ of habeas corpus. The
10 state court denied post-conviction relief on April 12, 2019. Herring filed a post-conviction appeal,
11 and on December 20, 2019, the Nevada Court of Appeals affirmed, determining that Herring's
12 state petition was untimely, procedurally barred, and an abuse of the writ. Remittitur issued on
13 January 14, 2020.

14 On December 2, 2021, Herring filed a third state petition for writ of habeas corpus. The
15 state court denied post-conviction relief on December 17, 2021. Herring filed a post-conviction
16 appeal, and on July 26, 2022, the Nevada Court of Appeals affirmed, determining that Herring's
17 state petition was untimely and procedurally barred. Remittitur issued on August 22, 2022.

18 On or about August 24, 2022, Herring initiated his instant Petition. (ECF No. 1-1.) On
19 August 25, 2022, this Court instructed Herring to file an *in forma pauperis* application or pay the
20 \$5.00 filing fee. (ECF No. 3.) Herring timely complied, filing an *in forma pauperis* application
21 on September 14, 2022. (ECF No. 4.)

22 II. DISCUSSION

23 Pursuant to Habeas Rule 4, the assigned judge must examine the habeas petition and order
24 a response unless it "plainly appears" that the petitioner is not entitled to relief. *See Valdez v.*
25 *Montgomery*, 918 F.3d 687, 693 (9th Cir. 2019). This rule allows courts to screen and dismiss
26 petitions that are patently frivolous, vague, conclusory, palpably incredible, or false. *Hendricks v.*
27

28 ²The Court takes judicial notice of the online docket records of this case.

1 *Vasquez*, 908 F.2d 490, 491 (9th Cir. 1990) (collecting cases). The court may also dismiss claims
 2 at screening for procedural defects. *See Boyd v. Thompson*, 147 F.3d 1124, 1128 (9th Cir. 1998).

3 Federal courts are courts of limited jurisdiction. *See Exxon Mobil Corp. v. Allapattah*
 4 *Servs., Inc.*, 545 U.S. 546, 552 (2005). “A federal district court is obligated to ensure it has
 5 jurisdiction over an action, and once it determines it lacks jurisdiction, it has no further power to
 6 act.” *Guerra v. Hertz Corp.*, 504 F. Supp. 2d 1014, 1017-18 (D. Nev. 2007) (citing *Steel Co. v.*
 7 *Citizens for a Better Env’t*, 523 U.S. 83, 94 (1998)).

8 “[A] federal habeas petition is second or successive if the facts underlying the claim
 9 occurred by the time of the initial petition, . . . and if the petition challenges the same state court
 10 judgment as the initial petition.” *Brown v. Muniz*, 889 F.3d 661, 667 (9th Cir. 2018). The
 11 Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”) provides, in relevant part, that
 12 a claim presented in a second or successive federal petition that was not presented in a prior petition
 13 shall be dismissed unless:

14 (B)(i) the factual predicate for the claim could not have been discovered previously
 15 through the exercise of due diligence; and

16 (ii) the facts underlying the claim, if proven and viewed in light of the evidence as
 17 a whole, would be sufficient to establish by clear and convincing evidence that, but
 for constitutional error, no reasonable factfinder would have found the applicant
 guilty of the underlying offense.

18 28 U.S.C. § 2244(b)(2). Before a second or successive petition may be filed in a federal district
 19 court, a habeas petitioner must move in the appropriate court of appeals for an order authorizing
 20 the district court to consider the petition. *See id.* § 2244(b)(3). The district court does not have
 21 jurisdiction to entertain a second or successive petition absent such permission. *See Brown*, 889
 22 F.3d at 667. “[I]n cases involving doubt about whether a petition will be deemed second or
 23 successive,” the Ninth Circuit has instructed “petitioners to seek authorization in [its] court first,
 24 rather than filing directly in the district court.” *Goodrum v. Busby*, 824 F.3d 1188, 1195 (9th Cir.
 25 2016) (citation omitted).

26 Herring’s instant Petition challenges the same December 30, 2013, judgment of
 27 conviction that was challenged in case number 2:16-cv-01639-GMN-GWF. And the petition filed
 28 in 2:16-cv-01639-GMN-GWF was decided on its merits. *See McNabb v. Yates*, 576 F.3d 1028,

1 1029-1030 (9th Cir. 2009) (holding that “the dismissal of a habeas petition as untimely constitutes
2 a disposition on the merits and that a further petition challenging the same conviction would be
3 ‘second or successive’”); *Henderson v. Lampert*, 396 F.3d 1049, 1053 (9th Cir. 2005) (holding
4 that “a denial on grounds of procedural default constitutes a disposition on the merits and thus
5 renders a subsequent § 2254 petition . . . ‘second or successive’ for purposes of the AEDPA”).
6 Moreover, an initial review of the Petition fails to show that Herring had not discovered the
7 factual predicates for his instant Petition before filing his previous petition. At the very least, the
8 filing of Herring’s petition in case number 2:16-cv-01639-GMN-GWF and corresponding 2017
9 merits decision raises serious doubt about whether Herring’s instant Petition will be deemed
10 second or successive. Accordingly, because Herring has indicated that he has not been given
11 permission by the Ninth Circuit Court of Appeals to file a successive petition (ECF No. 1-1 at 2),
12 this Court finds jurisdiction potentially lacking. As such, based on these issues, Herring will be
13 required to show cause why this action should not be dismissed without prejudice for a lack of
14 jurisdiction based on the Petition being second or successive.

15 This Court notes, by statute and circuit rule, it has discretionary authority to transfer
16 Herring’s Petition to the Ninth Circuit for consideration as an application for leave to file a
17 second-or-successive petition. *See* 28 U.S.C. § 1631 (stating that whenever a court identifies a lack
18 of jurisdiction, “the court shall, if it is in the interest of justice, transfer such action or appeal to
19 any other such court . . . in which the action or appeal could have been brought at the time it was
20 filed . . .”); 9th Cir. R. 22-3 (“If an unauthorized second or successive section 2254 petition . . . is
21 submitted to the district court, the district court may, in the interests of justice, refer it to the court
22 of appeals.”).

23 **III. CONCLUSION**

24 IT IS THEREFORE ORDERED that Petitioner’s motion to proceed *in forma pauperis*
25 (ECF No. 4) is GRANTED.

26 IT IS FURTHER ORDERED that on or before October 17, 2022, Petitioner Frank Herring
27 must file a “Response to Order to Show Cause” showing cause why this action should not be
28 dismissed without prejudice for a lack of jurisdiction based on the Petition being second or

1 successive. If Herring does not timely and fully respond to this order, this action will be dismissed
2 without prejudice and without further advance notice.

3 DATED this 19th day of September 2022.

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6 LARRY R. HICKS
7 UNITED STATES DISTRICT JUDGE
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